Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

TERRANCE ROSS WILLAMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Terrance Ross Willaman
765 Deer Creek Road
Cochranton, PA 16314

Pro se Petitioner

QUESTIONS PRESENTED

The following questions are presented by the petitioner:

I. Is a 28 U.S.C. § 2255 petition filed more than a year after the time limits mandated in the Antiterrorism and Effective Death Penalty Act (AEDPA) but within one year of a new Supreme Court decision addressing the subject "untimely"?

II. Do the protections of the Second Amendment addressed in *District of Columbia v. Heller*, 28 S.Ct. 2783 (2008) apply, control, or have any relevance in a federal criminal case?

PARTIES BELOW

Petitioner Terry Ross Willaman was the defendant -appellant in a 28 U.S.C. § 2255 Motion for Certificate of Appealability filed (and denied) in the court below. Respondent United States of America was the plaintiff-appellee.

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On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Terrance Ross Willaman, on behalf of himself, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, filed on August 25, 2009. There was no good-faith determination of the law in petitioner's case in either the district court or the Third Circuit Court of Appeals.

OPINIONS BELOW

The denial of the Motion for Certificate of Appealability is reproduced at Pet. App. 1a-2a, the denial of the Motion for Rehearing is reproduced at

Pet. App. 3a-4a. The district court decision is reproduced at Pet. App. 5a-14a.

JURISDICTIONAL STATEMENT

The Court of Appeals final judgment is the denial of the Petition for Rehearing was entered on August 25, 2009. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Second Amendment and Article V of the Constitution.

Article V, U.S. Constitution, provides:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

The Second Amendment, U.S. Constitution, provides:

> A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

STATUTORY PROVISIONS INVOLVED

This case involves 18 U.S.C. § 922(o)(1) and 28 U.S.C. § 2255(f)(2) and (3).

18 U.S.C. § 922(o)(1) provides:

> Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

28 U.S.C. § 2255(f)(2) and (3) provides:

> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;

STATEMENT OF THE CASE

Petitioner was originally arrested for a violation of 26 U.S.C. § 5861(d). After Petitioner filed a pretrial motion in the lower court raising a self-incrimination issue regarding that statute, the prosecutor changed the charge to one violation of 18 U.S.C. § 922(o)(1).

Petitioner was found guilty in a jury trial. That judgment and conviction was affirmed on February 17, 2006, *United States v. Willaman*, 437 F.3d 354 (3d Cir. 2006). Petitioner's Petition for Writ of Certiorari was denied by this Court on June 19, 2006.

This Court decided *District of Columbia v. Heller*, 28 S.Ct. 2783 (2008) on June 19, 2008.

Petitioner filed his 28 U.S.C. § 2255 petition on October 14, 2008, well within the one-year period of limitation mandated by 28 U.S.C. 2255(f)(3), which reads:

> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> > (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;

Petitioner was left with the distinct impression that the lower courts had made up their minds in advance to deny Petitioner his rights under the Second Amendment and to ignore his Article V issue.

[D]ue process cannot be satisfied when the state provides a "hearing" at which the judge is not really listening or before which the decision has already been made. See *United States v. Cross*, 128 F.3d 145, n. 2 (3d Cir. 1997).

This type of injustice has been ongoing for almost one hundred years.

> The aggrieved party read and reread the briefs as well as the transcripts. His mind is fed on

> nothing else during the three months waiting for the action of the court. He knows every point raised. He can repeat every argument advanced. All his savings through a lifetime are tied up in the case. He knows he is right. Then comes the decision. It deals with none of the points argued. It shows on its face the court refused to read the brief. He had been tossed aside like a white chip. He knows, and his friends know, he has been denied his day in court.
>
> To that man, to his family and to his friends, organized society is organized iniquity.
>
> And the present system is manufacturing citizens of such sentiments by the thousands every year.
>
> Underneath the social unrest of the world today, as its main underlying cause, is the feeling in the breasts of the masses that justice is not for them. They do not know the cause, nor can they suggest the remedy,—and so they only want to destroy. Society to them has come to mean *organized injustice*.
>
> John Rustgard,[1] *Dry Bones—The Remedy for the Evil*, 88 Central Law Journal, p. 341, 344 (May 9, 1919) (emphasis added).

In Biblical times judges traveled around and held court in tents. They set their own agendas and about the only way to have a court case heard was to bribe one of the attendants to bring the case to the

---

[1] Associate city attorney of Duluth, 1897-1898, mayor of Nome 1903-1904, U.S. district attorney 1st Division of Alaska, 1910-1914, and Attorney General of Alaska, 1921-1933.

attention of the judge. The widow of the passage found in Luke 18:1-8 had no money to bribe the attendants, so her case was not heard until the unjust judge could no longer withstand her unending pleas.

Today, judges in our federal system, ruling on lower court decisions, apparently are accountable only to God.

> The judge who knows other judges have erred, but agrees because he does not want to shame them, will end in *Gehenna*.
>
> *Leo Rosten's Treasury of Jewish Quotations*, p. 316 (1972).

This Court resembles those ancient courts in many ways but has become even more inaccessible while "organized injustice" prevails. How many prisoners have received "CERTIORARI DENIED" in the last ten years with no careful consideration of the questions presented?

Is there a just judge left in these times?

REASONS FOR GRANTING THE WRIT

This Writ must be granted in order to clarify the confusion in the lower courts regarding the actual holding of the *District of Columbia v. Heller* decision, *supra*, that this Court decided on June 26, 2008 and the applicability of 28 U.S.C. § 2255(f)(3) to that decision.

As Petitioner will also demonstrate, the *Heller* decision did not address the Article V issue that Petitioner has repeatedly attempted to get the lower court to address.

I. Is a 28 U.S.C. § 2255 petition filed more than a year after the time limits mandated in AEDPA but within one year of a new Supreme Court decision addressing the subject "untimely"?

Petitioner would bring to this Court's attention that *not one* defendant in any criminal case has been given *any* relief in *any* federal criminal case based upon the holdings in the *Heller* decision. The lower courts have "watered down" that holding in every conceivable fashion at every conceivable opportunity.

According to the Third Circuit Court of Appeals, "jurists of reason" would pay no attention to Petitioner's argument that his Petition was not untimely.

The lower court's reasoning can most charitably be described as "circular logic."

On June 26, 2008, the U.S. Supreme Court in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008) initially recognized that the Second Amendment was an *individual* right (mischaracterized as an "absolute right" in Third Circuit precedent).

Petitioner filed his Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody on October 14, 2008, well within the one-year period of limitation mandated by 28 U.S.C. § 2255(f)(3).

Previous to *Heller* all but two of the federal Circuit Court of Appeals had held that there *was* no individual right to possess firearms. Those two holdings were in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) and the case appealed in *Heller, Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

The other Circuit Courts of Appeals had, in what can most charitably be described as judicial sleight-

of-hand, used the Supreme Court decision in *United States v. Miller*, 307 U.S. 174 (1939)[2] to claim that the "collective right" theory originated in that case, which it did not nor did *Miller* so hold. That holding originally appeared in *Salina v. Blakesly*, 72 Kansas 230, 83 Pacific Reporter 61 (1905), a Kansas *state* Supreme Court case.

See also 28 U.S.C. § 2255(f)(2), which states:

> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> > (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

One would think the dishonest use of precedent would qualify as "governmental action," as would the refusal to acknowledge the issues by the Department of Justice employees.

II. Do the Second Amendment protections addressed in *District of Columbia v. Heller*, 28 S.Ct. 2783 (2008) apply, control, or have any relevance in a federal criminal case?

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[2] Before *Miller* was decided by the Supreme Court, the lower court gave a much more legitimate explanation. Note that in 1791, everyone understood—in a single sentence—what the Second Amendment meant. In 1934 it took two (2) pages in a district court opinion. By 2008 it took 5 out of 9 "points of view" seventy-one (71) pages to explain what the Second Amendment meant in *Heller*.

Should this Court address Petitioner's Article V issue, a lot of the confusion in the lower courts could be avoided. Examples of that confusion are:

A. Second Amendment

Willaman first argues that 18 U.S.C. § 922 ("section 922") violates the Second Amendment, and that "Congress had no right to amend the Second Amendment merely by legislation," Reply Br. at 7. Thus, in his view, the district court should have dismissed the indictment and allowed him to make a jury nullification argument. We review the district court's order upholding the constitutionality of section 922 and refusing to dismiss the indictment or allow a jury nullification argument on a plenary basis. *See United States v. Rybar*, 103 F.3d 273, 275 (3d Cir. 1996). We will not linger on this point inasmuch as a number of our cases, including *Rybar* in which we held that "this court has on several occasions emphasized that the Second Amendment furnishes no absolute right to firearms," 103 F.3d at 286, foreclose Willaman's Second Amendment arguments. Though Willaman argues that *Rybar* "is simply bad law," Reply Br. at 8, plainly it is binding on this panel. See Third Circuit I.O.P. 9.1.

United States v. Willaman, 437 F.3d 354 (3d Cir. 02/17/2006).

Did *Heller* overrule *Rybar* or did it not?

The centerpiece of the Court's textual argument is its insistence that the words "the people" as used in the Second Amendment must have the same meaning, and protect the same class of

> individuals, as when they are used in the First and Fourth Amendments. According to the Court, in all three provisions—as well as the Constitution's preamble, section 2 of Article I, and the Tenth Amendment—"the term unambiguously refers to all members of the political community, not an unspecified subset." *Ante*, at 6. But the Court itself reads the Second Amendment to protect a "subset" significantly narrower than the class of persons protected by the First and Fourth Amendments; when it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to "law-abiding, responsible citizens," *ante*, at 63. But the class of persons protected by the First and Fourth Amendments is not so limited; for even felons (and presumably irresponsible citizens as well) may invoke the protections of those constitutional provisions. The Court offers no way to harmonize its conflicting pronouncements.
>
> *Heller*, *supra*, (Stevens, J., dissenting).

The conflicting pronouncements do not need to be harmonized if Article V is addressed by this Court.

> Ross next argues that 18 U.S.C. § 922(o), which prohibits the possession of machine guns, is unconstitutional after *District of Columbia v. Heller*, ··· U.S. ···, 128 S.Ct. 2783 (2008). Ross appears to misunderstand *Heller*. *Heller* was concerned with a statute that prohibited all possession of handguns by the public. *Id.* at 2788. The *Heller* majority focused on the history of gun possession as a means of self-

> defense, finding that the textual elements of the Second Amendment "guarantee the individual right to possess and carry weapons in case of confrontation." *Id.* at 2797. In doing so, the Court was careful to state that it did "not read the Second Amendment to protect the right of citizens to carry arms for *any* sort of confrontation." *Id.* at 2799 (emphasis in original). In a further attempt to limit the effect of *Heller* to the right of law-abiding citizens to possess handguns for self-defense, the Court also cautioned that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill" and noted the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* at 2816-17.
>
> *United States v. Ross*, 323 Fed.Appx. 117 (3d Cir. 2009).

Is a machinegun a "dangerous" or "unusual weapon"? Is it dangerous? Of course. *All* weapons are dangerous to the people (or even animals) they are used *against*. Is it "unusual"? Or is a machinegun a weapon commonly used by the militia for the last *hundred years*?

> Nothing in *Heller* supports Ross's challenge to the constitutionality of a statute criminalizing the possession of a machine gun.
>
> *Id.*

Nothing in *Heller* supports the challenge? Why should it? *Heller* addressed *handguns*. Must this

Court address *each* type of firearm and *each* statute addressing their possession and use?

Addressing Article V could easily solve the problem:

> The Congress cannot—merely by legislating—amend the Constitution.
>
> *United Transp. Union v. I.C.C.*, 891 F.2d 908, 915-916 (D.C. App. 1989).
>
> [Congress] . . . is not given power by itself . . . to amend the Constitution.
>
> *Myers v. United States*, 47 S.Ct. 21, 37 (1926), *In re Young*, 141 F.3d 854, 859 (8th Cir. 1998).
>
> The legislature cannot enact laws for the accomplishment of objects not entrusted to the federal government.
>
> *Linder v. United States*, 45 S.Ct. 446 (1925).

CONCLUSION

This Court needs to end the confusion concerning its holding in the *Heller* decision, which it could easily do in this case.

For the reason set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Terrance Ross Willaman
765 Deer Creek Road
Cochranton, PA 16314
Pro se Petitioner

Dated: November 18, 2009

APPENDIX

APPENDIX A

CLD-226 June 25, 2009

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 09-1877

UNITED STATES OF AMERICA

VS.

TERRANCE ROSS WILLAMAN, Appellant

(W.D. Pa. Crim No. 04-cr-00028-001)
(criminal treated as civil)

Present: RENDELL, HARDIMAN and NYGAARD,
Circuit Judges

Submitted is Appellant's Request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

MMW/AF/par/jdw

ORDER

The request for a certificate of appealability is denied. Jurists of reason could not debate that the district court properly denied Appellant's 28 U.S.C. § 2255 motion to vacate his sentence as untimely. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

By the Court,

/s/ Thomas M. Hardiman
Circuit Judge

Dated: July 22, 2009
tmk/cc: Robert L. Eberhardt, Esq.
Terrance Ross Willaman

Marcia M. Waldron, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

09-1877

UNITED STATES OF AMERICA

v.

TERRANCE ROSS WILLAMAN, Appellant

(W.D. Pa. Crim No. 04-cr-00028-001)
(criminal treated as civil)

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN and NYGAARD*, *Circuit Judges*.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ Thomas M. Hardiman
Circuit Judge

Dated: August 25, 2009
par/cc: R.L.E., Esq.
Mr. T.R.W.

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* Honorable Richard L. Nygaard's vote is limited to panel rehearing.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Crim. No. 04-28 Erie
Civil Action No. 08-283 Erie

UNITED STATES OF AMERICA

vs.

TERRANCE ROSS WILLAMAN

Defendant

Opinion and Order

Before the Court is Terrance Ross Willaman's pro se Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. 74), with Memorandum in Support. The government filed a Response to the Motion (Doc. 77), to which Mr. Willaman filed a Reply (Doc. 78) and Memorandum of Law (Doc. 79). Finally the government filed a Sur-Reply to Mr. Willaman's Reply (Doc. 80). For the reasons stated below we will deny the motion.

Background

A federal indictment was initially filed in this case on May 11, 2004, charging Mr. Willaman with unlawful possession of a machinegun, which was not registered to him in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. § 5861(d). On September 15, 2005, the government filed a superseding indictment charging Mr. Willaman with with [sic] unlawful possession of

a Sten MKIII machinegun in violation of 18 U.S.C. § 922(o)(1).

Mr. Willaman, appearing pro se, was tried before a jury on October 19, 2004. The Jury returned a verdict of guilty on the sole count of the Indictment on October 20, 2004. On January 26, 2005, Mr. Willaman was sentenced to 27 months' imprisonment to be followed by 3 years' supervised release.

Mr. Willaman filed a timely appeal of his sentence to the United States Court of Appeals for the Third Circuit on January 31, 2005. The Court of Appeals affirmed Mr. Willaman's judgment of conviction and sentence on February 17, 2006. *United States v. Willaman*, 437 F.3d 354 (3d Cir. 2006). Mr. Willaman's petition for writ of certiorari to the United States Supreme Court was denied June 19, 2006. *Willaman v. United States*, 547 U.S. 1208, 126 S.Ct. 2902 (2006).

Motion to Vacate

Mr. Willaman raises the following claim in his pro se Motion to Vacate, Set Aside, or Correct Sentence ("Motion to Vacate"), pursuant to 28 U.S.C. § 2255: "Petitioner was convicted of statutes Congress had no authority to enact as they are in violation of the Second Amendment, U.S. Constitution." (Memorandum in Support of Motion to Vacate, at 1 .) In support of his claim he argues that the United States Supreme Court decision in District of Columbia v. Heller, -- U.S. -- 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) stands for the proposition that "there is an absolute right to own firearms," and thus his conviction for owning a firearm cannot stand. (Memorandum in Support of Motion to Vacate, at 2.)

In addition, he argues that statutes regulating firearms are unconstitutional legislative attempts to amend the Constitution in violation of Article V's enactment provision. (Memorandum in Support of

Motion to Vacate, at 3-5.) Article V requires that the amendment process requires proposed amendments to be introduced either by a two-thirds vote in both the Senate and the House, or an application of the legislatures of two-thirds of the states. A proposed amendment to the Constitution then must be ratified by the legislatures of three-fourths of the states (or by conventions in three-fourths of the states) before the Constitution is actually amended.

Evidentiary Hearing

When a Motion is made under 28 U.S.C. § 2255, the question of whether to order a hearing is committed to the sound discretion of the district court. In exercising that discretion, the court must accept the truth of the Petitioner's factual allegations unless they are clearly frivolous on the basis of the existing record. *United States v. Dav*, 969 F.2d 39, 41-42 (3d Cir. 1992). Further, the court must order an evidentiary hearing to determine the facts unless the motion and files and records of the case show conclusively that the petitioner is not entitled to relief. *Id.*; *United States v. Gordon*, 979 F.Supp. 337, 339 (E.D. Pa. 1997).

We find no need for an evidentiary hearing as the record conclusively establishes that the Petitioner is not entitled to the relief sought in the petition. 28 U.S.C. § 2255.

I. Standard of Review under 28 U.S.C. § 2255

Section 2255 of Title 28 of the United States Code provides a means of collaterally attacking a sentence imposed after a conviction. *United States v. Cannistraro*, 734 F.Supp. 1110, 1119 (D. N.J. 1989), *aff'd*, 919 F.2d 133 and 919 F.2d 137 (3d Cir. 1990), *cert. denied*, 500 U.S. 916. Pursuant to 28 U.S.C. § 2255, a federal prisoner may move the sentencing court to vacate, set aside or correct a sentence "upon

the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255. Relief under this provision is "generally available only in 'exceptional circumstances' to protect against a fundamental defect which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure." *United States v. Gordon*, 979 F. Supp. 337, 339 (E.D. Pa. 1997), citing *Hill v. United States*, 368 U.S. 424,428 (1962).

II. Discussion

A. Untimeliness of Mr. Willaman's Section 2255 Motion

The government argues that Mr. Willaman's section 2255 motion to vacate is untimely. Section 2255 imposes a one-year limitations period within which motions must be filed in order to be deemed timely. 28 U.S.C. § 2255(f). The one year time period for filing a section 2255 motion begins to run from the latest of (1) the date when the judgment of conviction becomes final; (2) the date on which a governmentally created impediment that prevented a movant from filing a motion is removed; (3) the date a newly recognized right is initially recognized by the Supreme Court and that such right has been made retroactively applicable to cases on collateral review; and (4) the date on which the facts supporting the claim could have been discovered. 28 U.S.C. § 2255(f)(1)-(4).

Mr. Willaman's motion is not timely under section 2255(f)(1), as his conviction became final on June 19, 2006, and his section 2255 motion was not filed until

October 18, 2008, well over the one-year limitations period. Likewise, neither subsection f(2) nor (f(4) apply to Mr. Willaman's situation. Thus, the only applicable circumstances under which Mr. Willaman's section 2255 motion would be deemed timely is section 2255(f)(3). This section provides that the one-year limitation period shall run from

> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been recognized by the Supreme Court and made retroactively applicable to cases on collateral review; . . .

28 U.S.C. §2255(f)(3).

Accordingly, Mr. Willaman argues that his motion is timely because it was filed within one year of the Supreme Court's decision *Heller*. He argues that the *Heller* opinion fits within section 2255(f)(3) because the date on which it was decided, June 26, 2008, was the date the Supreme Court initially recognized that the Second Amendment was an individual right. Therefore, according to Mr. Willaman, until *Heller* was decided he could not have raised the instant challenge to his conviction before the district court or on appeal. Mr. Willaman does not explicitly argue that *Heller* has been made retroactively applicable to cases on collateral review. However, he essentially argues that *Heller* set forth an intervening change of law that establishes that the conduct he engaged in, and for which he was convicted under section 922(o)(1), is no longer criminal conduct. Section 922(o)(1) of Title 18 of the United States Code provides, in part, that: " . . . [I]t shall be unlawful for any person to . . . possess a machine gun." Thus, Mr. Willaman asserts that post-*Heller*, it is now lawful to posses a machine gun. We disagree.

In *Heller*, the Supreme Court held that the District of Columbia's complete ban on usable handgun possession in the home violates the Second Amendment. 128 S.Ct. at 2814-18. In reaching its decision the Supreme Court held that "Second Amendment conferred an individual right to keep and bear arms." *Heller*, at 2799. The Court also recognized that this right was not unlimited:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.

Heller, at 2816 (citations omitted). The Supreme Court explained further that certain statutory restrictions on keeping and bearing arms were constitutional:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.
>
> We also recognize another important limitation on the right to keep and carry arms. *Miller* [*United States v. Miller*, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939)] said, as we have explained, that the sorts of weapons protected were those 'in common use at the time." 307 U.S., at 179, 59 S.Ct. 816, 83 L.Ed. 1206. We

> think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'

Heller, at 28 17 (footnote omitted). Moreover, the Supreme Court explicitly noted that it was not setting forth an exhaustive list of constitutionally permissible regulations regarding firearms:

> We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

Heller, at 28 17 n. 26.

The Supreme Court in *Heller* did not find that possession of machine guns is protected by the Second Amendment. *United States v. Fincher*, 538 F.3d 868, 873-74 (8th Cir.2008), *cert. denied*, 2009 WL 425 146 (Feb. 23,2009) ("Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use."); *see also United States v. Gilbert*, 2008 WL 2740453, *2 (9th Cir. 2008). Significantly, "it appears that every court which has considered a Second Amendment challenge to 18 U.S.C. § 922, post-*Heller*, has upheld the statute as constitutional." *United States v. Marzzarella*, 2009 WL 90395 (W.D.Pa. Jan. 14, 2009) (citing cases). In accord with these decisions we find that *Heller* does not establish an unconditional right to possess a firearm. Therefore, because *Heller* does not establish an intervening change of law retroactively applicable to cases on collateral review we will deny Mr. Willaman's section 2255 motion as untimely. Even if Mr. Willaman's motion were not untimely we would deny it for the reasons set forth above showing that under *Heller* there is no right to possess a machinegun.

We also find that Mr. Willaman's argument that statutes regulating firearms are unconstitutional legislative attempts to amend the Constitution in violation of Article V's enactment provision is untimely. Even if it were not untimely, to the extent that Mr. Willaman previously raised this argument on appeal he is not entitled to re-litigate it in his section 2255 petition. *Withrow v. Williams*, 507 U.S. 680, 720-721 (1993) (Scalia, J., concurring) ("Prior opportunity to litigate an issue should be an important equitable consideration in any habeas case, and should ordinarily preclude the court from reaching the merits of a claim, unless it goes to the fairness of the trial process or to the accuracy of the ultimate result.") Although the Court of Appeals did not explicitly rule on Mr. Willaman's Article V argument it stated as follows:

> In our disposition of this case we have recognized that Willaman's arguments are somewhat broader than the way we restate them. Nevertheless, we have considered all his points and find that they either are subsumed in the points as we have restated them or are without merit.

Willaman, 437 F.3d at 361 n.8.

B. Certificate of Appealability

The remaining issue before this Court is whether a certificate of appealability should be issued with respect to Mr. Willaman's motion to vacate. With respect to Mr. Willarnan's Article V claim we find that jurists of reason would not find it debatable whether Mr. Willaman states a valid claim of the denial of a constitutional right and jurists of reason would not find it debatable whether we were correct in our ruling that his claim was barred. The Court also concludes that Mr. Willaman has not made a

substantial showing of the denial of a constitutional right as to his Second Amendment claim under *Heller,* and that reasonable jurists would not find our assessment of the constitutional claim debatable in light of the Supreme Court's recent denial of certiorari in *United States v. Fincher*, 538 F.3d 868 (8th Cir.2008)' *cert.* denied, 2009 WL 425 146 (Feb. 23, 2009). Accordingly, a certificate of appealability will not be issued.

III. Conclusion

For the reasons set forth herein, the Court concludes that Mr. Willaman is not entitled to relief under 28 U.S.C. § 2255. Therefore, the Petitioner's Motion Under § 2255 will be denied. Accordingly, the following order is therefore entered.

AND NOW, to-wit, this 4th day of March, 2009, for the reasons stated above, it is hereby ORDERED, ADJUDGED, and DECREED that Petitioner's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. 74), be and hereby is DENIED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that a certificate of appealability SHOULD NOT ISSUE with respect to this Court's Order denying Petitioner's section 2255 Motion because, for the reasons set forth in the Opinion accompanying this Order, he has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). *See also* Third Circuit Local Rule 22.2 (stating that "[i]f an order denying a petition under . . . § 2255 is accompanied by an opinion . . . it is sufficient if the order denying the certificate [of appealability] references the opinion ....").

/s/ Maurice B. Cohill, Jr.
Senior United States District Judge

cc: counsel of record
Terrance Willaman, pro se